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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FRANK MUNOZ et al.,

Plaintiffs and Appellants,

v.

PACIFIC BAY HOMES, LLC,

Defendant and Respondent.

D049197

(Super. Ct. No. GIC816829)

APPEAL from an order of the Superior Court of San Diego County, Ronald L. Styn, Judge. Affirmed.

Plaintiffs Frank Munoz and Bertha Munoz (together Buyers) appeal an order denying their motion for attorney fees after a judgment was entered on a special jury verdict awarding them damages in their construction defect action against defendant Pacific Bay Homes, LLC (Homes). On appeal, Buyers contend they are entitled to an award of attorney fees because: (1) the attorney fees provision in the purchase agreement between Buyers and Pacific Bay Properties, Inc., (Properties) binds Homes; (2) that

attorney fees provision applies to Buyers' tort cause of action; and (3) Buyers prevailed in their action against Homes.

FACTUAL AND PROCEDURAL BACKGROUND

In early 1998, Pacific Bay Homes, Inc., merged into Properties, which undertook development of the Rolling Hills Ranch community in Chula Vista.¹ At about the same time, Homes was created. Homes provided warranty service work for new homes built by Properties.

On or about April 3, 1999, Properties and Buyers entered into an agreement for purchase and sale of real property, escrow instructions, and receipt for deposit (Purchase Agreement) for the purchase by Buyers from Properties of a newly constructed home in the Rolling Hills Ranch community. The Purchase Agreement provided that Properties would provide Buyers with a limited warranty:

"15. WARRANTY AND DISCLAIMER. SELLER [i.e., Properties] OR ITS DULY LICENSED GENERAL CONTRACTOR HAS UNDERTAKEN THE CONSTRUCTION AND DEVELOPMENT OF THE PROJECT, INCLUDING WITHOUT LIMITATION THE CONSTRUCTION AND DEVELOPMENT OF THE PROPERTY BEING ACQUIRED BY BUYER. IN CONJUNCTION WITH SUCH ENGAGEMENT, SELLER WILL PROVIDE BUYER AT THE CLOSE OF ESCROW WITH A 'HOMEOWNERS' LIMITED WARRANTY' WHEREBY IN ACCORDANCE WITH THE TERMS AND SUBJECT TO THE LIMITATIONS SET FORTH THEREIN, SELLER WILL WARRANT BUYER'S HOME AGAINST DEFECTS IN THE ORIGINAL MATERIALS AND WORKMANSHIP FOR ONE (1) YEAR FROM THE DATE OF

¹ "Pacific Bay Homes, Inc." was an entity separate from "Pacific Bay Homes, LLC."

THE CLOSE OF ESCROW AND FURTHER WARRANT THAT SELLER WILL REPAIR OR REPLACE, AT ITS SOLE DISCRETION, AND AT NO CHARGE TO BUYER, ANY COMPONENT OF THE HOME WHICH IS FOUND STRUCTURALLY OR FUNCTIONALLY DEFECTIVE DURING THE PERIOD OF THE HOMEOWNERS' LIMITED WARRANTY. [¶] . . . [¶]

"A COPY OF THE HOMEOWNERS' LIMITED WARRANTY FORM WILL BE SUPPLIED TO BUYER AT THE TIME OF BUYER'S WALK-THROUGH INSPECTION OF THE PROPERTY. SUCH WALK-THROUGH INSPECTION WILL OCCUR PRIOR TO THE CLOSE OF ESCROW. BUYER HEREBY AGREES TO ACKNOWLEDGE RECEIPT OF THE HOMEOWNERS' LIMITED WARRANTY FORM AS HEREINAFTER PROVIDED, AND TO BE BOUND BY THE PROVISIONS THEREOF FOLLOWING THE CLOSE OF ESCROW. BUYER SHALL ACCOMPLISH SUCH ACKNOWLEDGEMENT BY EXECUTING AND DELIVERING SELLER'S STANDARD FORM ACKNOWLEDGEMENT INSTRUMENT TO SELLER PROMPTLY FOLLOWING BUYER'S RECEIPT OF SAME AND IN ANY EVENT PRIOR TO THE CLOSE OF ESCROW."

The Purchase Agreement also contained the following attorney fees provision in paragraph 18(f):

"ATTORNEY'S FEES. In the event of the bringing or initiation of any arbitration proceeding, action or suit by either party against the other arising out of this Contract, the party in whose favor the award or final judgment shall be entered shall be entitled to recover from the other party all costs and expenses of the proceeding, action or suit, including reasonable attorney's fees."

On or about April 28, Homes and Buyers executed a document entitled "RECEIPT OF THE HOMEOWNERS' LIMITED WARRANTY" (Receipt), which provided:

"Seller has engaged the Pacific Bay Homes Company, LLC, a California corporation [i.e., Homes], a duly licensed general contractor, to undertake the construction and development of the

Project, including without limitation the construction and development of the property being acquired by Buyer. In conjunction with such engagement, Seller will cause Pacific Bay Homes, LLC, to provide Buyer at the close of escrow with a standard form 'Homeowners' Limited Warranty'.

"Buyer hereby acknowledges and agrees that Buyer has received a copy of the standard form Homeowners' Limited Warranty, and understands that Pacific Bay Homes, LLC, will provide only certain specific limited warranties to Buyer as set forth therein, which specific limited warranties will only deal with certain portions of the Property being acquired by Buyer. Following the close of escrow, Buyer hereby agrees to be bound by the terms and limitations set forth in the Homeowners' Limited Warranty.

"The provisions of this Addendum are hereby incorporated in and made a part of the provisions of the Agreement for Purchase and Sale of Real Property, Escrow Instructions and Receipt for Deposit between Buyer and Seller." (Original italics.)

On or about May 4, 1999, a grant deed transferring ownership of the new home from Properties to Buyers apparently was recorded.² Thereafter, Homes performed warranty service work at Buyers' home.

On or about August 27, 2003, Buyers filed a complaint against Homes alleging causes of action for breach of express warranty, strict liability in tort, and negligence.³ Buyers alleged there was improper construction of the home's driveway, slab and

² Although the record on appeal does not contain a copy of that grant deed, Homes does not dispute this representation of fact by Buyers in their opening brief. Therefore, for purposes of this opinion, we will presume that grant deed was recorded on or about that date. Pursuant to the Purchase Agreement, we further presume Properties was named as the grantor of that deed.

³ The record on appeal does not show why Buyers omitted *Properties* as a defendant in their construction defect action.

foundation system, stucco system, and plumbing system. Their complaint sought compensatory and special damages and an award of attorney fees. At trial, the jury found Homes strictly liable in tort for construction defects in the total amount of \$29,822.⁴

On March 28, 2006, the trial court entered judgment on the jury's special verdict awarding Buyers \$29,822 in damages against Homes. On May 24, Buyers filed a motion for attorney fees, arguing that the Purchase Agreement's attorney fee provision bound Homes because the Receipt, executed by Homes, was incorporated into the Purchase Agreement.⁵ On June 16, the trial court denied Buyers' motion for attorney fees, stating:

"The attorneys' fees provision contained [in Buyers'] contract with third-party [Properties] is not enforceable against [Homes]. [Buyers] have not established that there was an assignment of rights under the contract by [Properties] to [Homes]. *Heppler v. J.M. Peters Co.* (1999) 73 Cal.App.4th 1265 is distinguishable. The plaintiffs in *Heppler* received an express assignment of the developer's indemnity rights under the contract. *Republic Bank v. Marine Nat. Bank* (1996) 45 Cal.App.4th 919 is also distinguishable. In *Republic*, the court found that a master lease was incorporated into a subsequently signed sublease because the sublease specifically provided that the master lease was incorporated into the sublease. In this case, the [Purchase Agreement] incorporates the subsequently executed [Receipt] into it -- the reverse of facts presented in *Republic*. Moreover, at trial, [Buyers] did not pursue a breach of contract cause of action based on the Purchase Agreement. Rather, [Buyers] pursued a breach of warranty cause of action against [Homes], and, the jury found against [Buyers] on this cause of action. Since [Buyers] do not have a contractual right to attorneys

⁴ On Buyers' other two causes of action, the jury found Homes was not negligent and did not breach its express warranty.

⁵ Buyers also argued the attorney fees provision covered their tort cause of action and they prevailed in their action against Homes.

fees as against [Homes], [Buyers] are not entitled to recover attorneys fees as a prevailing party under Civil Code § 1717."

Buyers timely filed a notice of appeal.

DISCUSSION

I

Attorney Fees Provision in the Purchase Agreement

Buyers contend they are entitled to an award of attorney fees incurred in their action against Homes because Homes is bound by the attorney fees provision in the Purchase Agreement. They argue that because the Receipt, executed by Homes, was incorporated into the Purchase Agreement, the attorney fees provision in the Purchase Agreement was necessarily incorporated into the Receipt and therefore contractually obligates Homes to pay their attorney fees. They also argue that because Homes assumed all of Properties' warranty obligations under the Purchase Agreement, Homes also assumed Properties' obligation to pay their attorney fees.

A

We are not persuaded by Buyers' contention that the Purchase Agreement's attorney fees provisions was incorporated into the Receipt. Although Buyers assert Homes is bound by the Purchase Agreement's attorney fees provision because the Receipt, executed by Homes, was incorporated into the Purchase Agreement, we conclude the Receipt did *not* effectively become incorporated into the Purchase Agreement. First, despite language in the Receipt purportedly incorporating its provisions into the Purchase Agreement, the Receipt was a document executed by Buyers

and *Homes*, rather than by the parties to the Purchase Agreement (i.e., Buyers and *Properties*). Incorporation of a subsequently executed document into an original agreement is, in effect, a modification or amendment of that original agreement and therefore requires the assent of the parties to that original agreement. In this case, because *Properties* was not a party to and did not execute the Receipt, the Purchase Agreement was not effectively amended or modified by the provisions of the Receipt, despite language in the Receipt purporting to incorporate its provisions into the Purchase Agreement. Accordingly, the provisions of the Receipt were not, in fact or in law, incorporated into the Purchase Agreement.

Second, assuming *arguendo* the Purchase Agreement had been modified by incorporation of the provisions of the Receipt, the Purchase Agreement's attorney fees provision nevertheless would *not* have been effectively incorporated into the Receipt. The fact that an original agreement may be subsequently amended or modified by incorporation of a subsequent agreement or other document does not mean that under the law the converse is true (i.e., that the provisions of the original agreement are incorporated into that subsequent agreement or other document). Without express language showing the parties' intent to incorporate the original agreement's provisions into that subsequent agreement or other document, no incorporation is effected.⁶

⁶ In that regard, *Republic Bank v. Marine Nat. Bank*, *supra*, 45 Cal.App.4th 919, cited by Buyers, is inapposite. That case involved the typical incorporation situation in which a prior or contemporaneous document is expressly incorporated into an agreement. "The phrase 'incorporation by reference' is . . . a 'doctrine of law' where 'the terms of a contemporaneous or earlier writing, instrument, or document capable of being identified

Accordingly, because the Receipt did not contain any language that can be reasonably construed as incorporating the provisions of the Purchase Agreement into the Receipt, the Purchase Agreement's attorney fee provision was not incorporated into the Receipt and therefore does not bind Homes.

B

Buyers also assert that because Homes assumed all of Properties' warranty obligations under the Purchase Agreement, Homes also assumed Properties' contractual obligation to pay their attorney fees. However, Buyers do not cite anything in the appellate record that shows Homes, in fact or in law, assumed all of Properties' warranty obligations under the Purchase Agreement. Although they cite language in the Receipt showing Homes agreed to provide warranty service work to them, that language was insufficient to effect an assumption by Homes of all of Properties' warranty obligations under the Purchase Agreement and/or a release of Properties from its warranty obligations. The Receipt provided: "*Seller will cause Pacific Bay Homes, LLC, to provide Buyer at the close of escrow with a standard form 'Homeowners' Limited*

can be made *an actual part* of another writing, instrument, or document by referring to, identifying, and adopting the former as a part of the latter.' [Citation.]" (*Id.* at p. 922.) In *Republic Bank*, the parties to a sublease of real property expressly provided in the sublease that the terms of the master lease would be incorporated by reference into the sublease. (*Id.* at p. 921.) Therefore, the court concluded the attorney fees provision of the master lease would, along with the other provisions of the master lease, be incorporated into and be binding on the parties to the sublease. (*Id.* at pp. 921-925.) Because in our case the Receipt did not expressly incorporate by reference the provisions of the Purchase Agreement into the Receipt, *Republic Bank* is inapposite and the attorney fees provision of the Purchase Agreement does not bind Homes.

Warranty.' " That language in effect provided that Properties retained Homes to provide Buyers with a standard homeowners' limited warranty and, pursuant to the warranty, to perform warranty service work on behalf of Properties with respect to Buyers' home. The Receipt does not contain any language providing Homes assumes all of Properties' warranty obligations under the Purchase Agreement or releasing Properties from those warranty obligations. On the contrary, the Receipt, at most, provided Homes would provide warranty service work on behalf of Properties. Therefore, Homes in effect acted as a subcontractor in the performance of Properties' warranty obligations under the Purchase Agreement.⁷

That action by Homes did not effect a release of Properties from its primary obligation under the Purchase Agreement to provide a homeowners' limited warranty and warranty service work. (Cf. *Scott v. Mullins* (1962) 211 Cal.App.2d 51, 56 [Sublessee's assignees "did not consent to relieve [sublessor] of obligations in the sublease. Therefore, the latter remains liable to perform the obligations therein notwithstanding his assignment of the sublease to" others.].) Buyers do not cite, and we did not find, any case holding that a subcontractor who performs work on behalf of a general contractor necessarily assumes the general contractor's obligation to pay attorney fees pursuant to its separate agreement with the buyer. Accordingly, by executing the Receipt or by

⁷ Although, as Buyers note, paragraph 18(l) of the Purchase Agreement provides that its provisions "shall be binding upon and shall inure to the benefit of the successors and assigns of Seller [i.e., Properties]," there is nothing in the appellate record showing Homes *was* the successor or assignee of Properties or its rights and/or obligations under the Purchase Agreement.

otherwise agreeing to perform warranty service work for Properties, Homes did *not* assume Properties' obligation to pay attorney fees under the Purchase Agreement.⁸

C

Although Buyers summarily cite other grounds purportedly showing Homes is bound by the Purchase Agreement's attorney fees provision (e.g., Civ. Code, §§ 1084, 1636, 1642), we remain unpersuaded that Homes is bound by that provision. Absent any provision *in the Receipt* or otherwise expressly requiring Homes to pay Buyers' attorney fees in this action, we conclude Homes does not have an obligation to pay Buyers' attorney fees incurred in this action. Accordingly, we conclude the trial court did not err by denying Buyers' motion for attorney fees.

II

Remaining Contentions

Because we decide this appeal on the ground that Homes did not have a contractual obligation to pay Buyers' attorney fees incurred in this action, we need not address their other contentions premised on that contractual obligation.

⁸ *Heppler v. J.M. Peters Co.*, *supra*, 73 Cal.App.4th 1265, cited by Buyers, is inapposite. In *Heppler*, the general contractor expressly assigned all of its contractual indemnification rights against its subcontractors to the plaintiff buyers. (*Id.* at p. 1289.) The general contractor's agreement with its subcontractors included an attorney fees provision. (*Ibid.*) The court held that although the general contractor's assignment of rights was silent regarding attorney fees, its contractual right to attorney fees in indemnification actions against its subcontractors was necessarily assigned along with the assignment to the plaintiff buyers of its indemnification rights. (*Id.* at pp. 1289-1292.) Unlike in *Heppler*, in this case Properties did not assign any of its *rights* to Homes, and Homes did not assume all of Properties' warranty obligations under the Purchase Agreement.

DISPOSITION

The order is affirmed. Homes is entitled to costs on appeal.

McDONALD, J.

I CONCUR:

HUFFMAN, Acting P. J.

I CONCUR IN THE RESULT:

O'ROURKE, J.